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District Court

FEB 15 2008

For The Northern Mariana Islands
By _____
(Deputy Clerk)

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4
5 **IN THE UNITED STATES DISTRICT COURT**
6 **FOR THE NORTHERN MARIANA ISLANDS**

7 **JOHN S. PANGELINAN,**

8 Plaintiff,

9 vs.

10 **DAVID A. WISEMAN, et al.,**

11 Defendants.

12 **ANGELITO TRINIDAD, RONNIE**
13 **PALERMO, HERMAN TEJADA,**
14 **ESPERANZA DAVID, ANTONIO**
15 **ALOVERA , and UNITED**
16 **STATES OF AMERICA,**

17 Respondents.

Case No. CV 08-0004

MEMORANDUM IN
SUPPORT OF MOTION TO
DISMISS BY LILLIAN A.
TENORIO AND ROBERT T.
TORRES PURSUANT TO
RULE 12(b)(6) AND
MOTION FOR SANCTIONS

Date: APR 17 2008
Time: 9:00 a.m.
Judge:

18 **INTRODUCTION**

19 The Complaint in the above-entitled matter must be dismissed as to
20 defendants Robert T. Torres and Lillian A. Tenorio for failure to state a claim
21 upon which relief can be granted. Robert T. Torres and Lillian A. Tenorio are
22 attorneys engaged in the private practice of law in the Commonwealth. At all
23 times material to this action, Mr. Torres and Ms. Tenorio were engaged to

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1 assist Pangelinan's former employees, Angelito Trinidad, Ronnie Palermo,
2 Herman Tejada, Esperanza David, and Antonio Alovera (the "Trinidad
3 Plaintiffs") with the collection of a judgment obtained against Pangelinan and
4 his wife by prior counsel in Civil Action 97-0073 (the "Underlying
5 Judgment"). In this Bivens-styled action, Plaintiff John S. Pangelinan
6 nevertheless asserts that Attorneys Torres and Tenorio are "state actors", who
7 conspired with judges Munson and Wiseman to violate his First Amendment
8 rights and deprive him of his liberty and property without due process of law.^{1/}
9

10 How Torres and Tenorio allegedly accomplished these wrongs as
11 federal agents is not readily apparent. Pangelinan claims Tenorio violated his
12 rights when she obtained an order permitting execution on Pangelinan's
13 Papago property to satisfy the Underlying Judgment; when she consulted with
14 auctioneer Roy Alexander about the threats in Pangelinan's infamous June 1
15 Letter, threatening reprisals for anyone connected with the sale of the Papago
16 Property and published in the local newspapers; and when she tendered a bid
17 on behalf of the Trinidad Plaintiffs at the execution sale.^{2/} Through these
18 actions, Pangelinan claims that Tenorio collaborated with the Federal
19 Defendants to indict, arrest, prosecute, convict, and imprison Pangelinan in
20 retaliation for publishing the June 1 Letter and for his "exercising his First
21

22 ^{1/}(Compl. at 3.)

23 ^{2/}(Compl. ¶¶ 5, 7, and 15.)

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Amendment right of free speech.”^{3/}

Pangelinan attacks Torres for obtaining an injunction^{4/} to put an end to Pangelinan’s self-help efforts to recapture certain property in Garapan that had been sold to satisfy the Underlying Judgment.^{5/} According to Pangelinan, Torres is also guilty of seeking assets to satisfy the deficiency judgment in Civil Action 97-0073, and of applying to the court for an order of contempt when Pangelinan refused to appear for deposition and when he refused to be sworn, once he eventually showed up.^{6/} For these acts, Pangelinan charges Torres with retaliatory denial of due process of law, of liberty, and of property.^{7/}

Both Torres and Tenorio, Pangelinan also complains, are guilty of appearing before Judge Wiseman to enjoin him from interfering with the

^{3/}(Compl. at 11.)

^{4/} In the event that anyone is uncertain about which of the many writs restraining Pangelinan is at issue here, it is the temporary restraining order, that was later converted into a permanent injunction, as a “non-existent, post-judgment already-enforced judgment writ.” (Compl. ¶ 46.) Pangelinan admits that “almost immediately after it was issued, he defied Wiseman’s temporary restraining order by appearing at the site or the land and chained the front door and attempted to oust the occupants.” *Id.* ¶ 47.

^{5/}(*See* Compl. ¶¶ 44-46.) According to Pangelinan, Torres’ efforts to end Pangelinan’s terrorizing of MSDC’s lessees made him a “*de facto* landlord by a supposed acquired interest in the Garapan land by the public sale of said land” that was “done contrary to federal law and statute, “rendering the deed void too for other reasons.” (Compl. ¶ 46.)

^{6/}(Compl. ¶¶ 47-50.)

^{7/}(Compl. at 29-30.)

1 judicially-ordered execution sale; for obtaining an order to eject him from the
 2 Papago Property after its sale; “for the unlawful, retaliatory taking of
 3 Pangelinan’s Papago land”; and for ousting him and his family from the
 4 Property.^{8/}

5 Notwithstanding his bald allegation charging the opposite, the
 6 Complaint offers no facts to establish Attorneys Torres and Tenorio qualify as
 7 state actors responsible for the perpetration of Pangelinan’s alleged
 8 constitutional injuries. *See Dennis v. Sparks*, 449 U.S. 24, 28, 101 S. Ct. 183,
 9 66 L.Ed.2d 185 (1980) *Pangelinan v. Munson*, 54 F.Appx. 472, 2003 WL
 10 124474 (9th Cir. 2003). “[M]erely resorting to the courts and being on the
 11 winning side of a lawsuit does not make a party a co-conspirator or a joint
 12 actor with the judge.” *Dennis*, 449 U.S. at 28, 101 S. Ct. at 186. To prove a
 13 conspiracy between Pangelinan and any of the Federal Defendants, moreover,
 14 Plaintiff must also assert concrete facts evidencing some sort of agreement or
 15 meeting of the minds to violate Pangelinan’s constitutional rights. *See Lugar*
 16 *v. Edmondson Oil Co., Inc.*, 457 U.S. 922, 939, 102 S. Ct. 2744, 2754, 73
 17 L.Ed.2d 482 (1982); *Woodrum v. Woodward County, Okl.*, 866 F.2d 1121,
 18 1126 (9th Cir. 1989). Because the claims against Torres and Tenorio likewise
 19 fail entirely in this respect, they should be dismissed for this reason.
 20

21 This is not the first time that John Pangelinan has blamed opposing
 22

23 ^{8/}(Compl. ¶¶ 12-14, 19.)

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counsel for his troubles. *See Pangelinan*, 54 F.Appx. 472, 2003 WL 124474 (dismissing constitutional claims against Trinidad Plaintiffs' former attorney, Charles Rotbart, since Rotbart was not a state actor and closing appeal). This is also not the first time that Pangelinan has, in reprisal, filed a meritless claim. *See Trinidad v. Pangelinan*, 54 Fed.Appx. 470, 2003 WL 124471 (9th Cir. 2003), *cert. denied*, 538 U.S. 1064, 123 S. Ct. 2232, 155 L.Ed.2d 1119 (2003).^{9/} As set forth in the Factual Statement below, Attorneys Torres and Tenorio have done nothing but apply to this court for orders protecting their clients. Because Pangelinan's sole purpose in joining Mr. Torres and Ms. Tenorio in this action is to harass them and cause a wholly unnecessary expenditure of judicial resources as well as their time, an award of costs and fees is called for in this case.

FACTS

1. On June 5, 2000, the district court issued Amended Findings of Fact and Conclusions of Law finding Pangelinan liable to the Trinidad Plaintiffs for RICO violations, mail and wire fraud, and common law fraud. (Compl. ¶ 25.)

2. To satisfy the judgment, certain properties in Garapan, belonging to John and Merced Pangelinan, were auctioned and sold to the Trinidad

⁹ Even though the Court of Appeals closed the file, Pangelinan attempted to appeal this ruling on May 3, 2002. *See Record of Proceedings of Trinidad v. Pangelinan*, CV. 97-00073 (No. 344-1).

1 Plaintiffs, as judgment creditors. (Compl. ¶ 4.)

2 3. John Pangelinan filed several appeals to contest the Underlying
3 Judgment.^{10/} The Ninth Circuit Court of Appeals affirmed the district court's
4 rulings and affirmed the sale of these properties on March 19, 2002. *See*
5 *Trinidad v. Pangelinan*, 32 Fed.Appx. 357, 2002 WL 461731 (9th Cir.
6 2002).^{11/}

7 4. Notwithstanding the rulings of the court, John Pangelinan and his
8 wife chose to ignore the judicial sale of the Garapan property, refused to leave
9 it, and continued to threaten the lessee – in person, through the mails, and by
10 facsimile – with “self help” eviction notices in order to induce the lessee not
11 to pay rents. To put an end to this harassment, Mr. Torres obtained an order
12 restraining and enjoining John and Merced Pangelinan from taking or doing
13 any act whatsoever that would affect the right of the Trinidad Plaintiffs to
14

15
16 ¹⁰ In consolidated Appeal Nos. 00-15697 and 00-15705, John and Merced
17 Pangelinan appealed the judgment. In companion Appeal No. 00-16630, the Pangelinans
18 appealed the district court's order issuing writs of attachment and execution and levy on
19 their bank account to satisfy the judgment. In companion Appeal No. 01-16622, the
20 Pangelinans appealed the sale of their real property to satisfy the Underlying Judgment
21 and the entry of a preliminary injunction preventing them from interfering with the lessee
of one of the properties subject to the writ of attachment. Each of the district court's
rulings were upheld. 32 Fed. Appx. 357, 2002 WL 461731 (9th Cir. Mar. 15, 2002). Mr.
Pangelinan, however, never missed any additional opportunity to raise his objection to
jurisdiction. See Objection to Plaintiffs' Motion to Compel Attendance at a Deposition
and for Sanctions and Pangelinans' Motion to Dismiss for Court's Lack of Article III
Subject Matter Jurisdiction (Mar. 10, 2004) (No. 396-1).

22 ¹¹ Appeal No. 00-15697 was a consolidated appeal that included Appeal Nos. 00-
23 15706, 00-16630, and 01-16622. See 32 Fed. Appx. 357, 2002 WL 461731 (9th Cir.
March 15, 2002).

1 receive rents or other income due them.^{12/}

2 5. On April 21, 2001, Pangelinan filed a Rule 60(b)(4) motion to
3 vacate or annul the Underlying Judgment, arguing that the district court
4 lacked jurisdiction over him as well as the subject matter. (*See* Compl. ¶ 3.)
5 On January 15, 2003, the Ninth Circuit issued its memorandum decision in
6 Appeal No. 02-16013, affirming the district court's judgment denying the Rule
7 60(b)(4) motion to void the judgment. *See Trinidad*, 54 Fed.Appx. 470, 2003
8 WL 124471.^{13/}

9
10 6. When Pangelinan refused to satisfy the balance of the
11 Underlying Judgment voluntarily, the Trinidad Plaintiffs levied execution on
12 four parcels of the Pangelinans' land (the "Garapan Property") for \$201,000.
13 Because the proceeds of the sale of the Garapan Property were insufficient to
14 satisfy the judgment, a deficiency remained that continued to accrue interest
15 from July 1, 2001.

16
17 7. Pangelinan's continuing objections to the Judgment and his
18 defiance of this court's rulings brought him civil and criminal sanctions. In
19 July of 2000, former counsel Rotbart applied to the court for the first of
20

21 ¹² *See* Order Granting Preliminary Injunction; Order Denying Motion to Release
22 Funds; and Order Awarding Attorney Fees and Costs (No. 315-1).

23 ¹³ Even though the Court of Appeals closed the file, Pangelinan attempted to
appeal this ruling on May 3, 2000. *See* Record (May 3, 2000) (No. 344-1).

1 several restraining orders to restrain John and Merced Pangelinan from
2 interfering with the execution of the Underlying Judgment.^{14/}

3 8. In an effort to collect the deficiency, Mr. Torres, on behalf of
4 the Trinidad Plaintiffs, attempted to depose Pangelinan to determine whether
5 there were any additional assets available to satisfy the balance. Not only did
6 Pangelinan refuse to cooperate and fail to appear when noticed, but when he
7 did show up at deposition, he refused to disclose information about his
8 financial status and take the oath required by Rule 30(b)(4). For this, the
9 district court ultimately found Pangelinan in contempt.^{15/}

10
11 9. The Trinidad Plaintiffs, through the efforts of attorney Torres,
12 “finally” obtained a title report revealing that Pangelinan owned all right, title
13 and interest in certain property in Papago (Lot E.A. 222 or the “Papago
14 Property”). (Compl. ¶ 30.) Thus, when the Trinidad Plaintiffs applied for a
15 writ of execution to levy on E.A. 222,^{16/} the court issued a writ in January of
16 2006, authorizing the property to be sold at judicial sale^{17/}. *See also*
17 Amended Order Granting Writ of Execution (Mar. 9, 2006) (No. 502).

19 ¹⁴*See, e.g.*, Record of Proceedings at 22 (No. 305-1); Order Granting Preliminary
20 Injunction (No. 315-1).

21 ¹⁵*See* Order Finding Defendant John S. Pangelinan in Contempt of Court (April
22 30, 2004) (No. 430).

23 ¹⁶*See* Notice of Motion for Writ of Execution (Dec. 30, 2005) (No. 464).

¹⁷Order Granting Writ of Execution (Jan. 27, 2006) (No. 485).

10. Pangelinan opposed the writ and proposed to substitute two other parcels of property.^{18/} After carefully considering and rejecting each of Pangelinan's arguments – including his challenges to the court's jurisdiction, the court authorized and directed Roy E. Alexander to levy execution upon Lot. No. E.A. 222 in order to satisfy the balance of the Underlying Judgment. *See* Order Authorizing Roy Alexander to Levy Execution (Feb. 23, 2006) (No. 492); Order Granting Writ of Execution (Jan. 27, 2006) (No. 485); Amended Order Granting Writ of Execution (Mar. 9, 2006) (No. 502).

11. Alexander scheduled a judicial sale of Lot E.A. 222 for June 2, 2006 at Alexander's office and arranged for publication of the notices of the sale. *Id.*

12. One day prior to the scheduled date of sale, Pangelinan delivered a letter addressed to an editor (the "June 1 Letter") to Alexander's office. (Compl. ¶ 6.) The next day, the letter to the editor was published in the MARIANAS VARIETY. (*Id.*) Among other things, the letter announced to "the whole world that the Court's (Munson's) judgment and (Wiseman's)

¹⁸ Pangelinan contended that because the CNMI had no statute designating anyone to issue a writ of execution, it was incumbent upon the Trinidad Plaintiffs, as judgment creditors, to obtain a praecipe from the clerk of the court. *See* Objection to Plaintiffs' Motion for Writ of Execution and Sale of Real Property (Jan. 17, 2006) (No. 477). The Pangelinans further contended that they were using the Papago Property as their residence, and thus it was exempt from execution; that the Underlying Judgment – even if valid – had already been satisfied.

1 orders were all void, that the sale would be void and [that the] would-be
2 purchaser would be buying himself nothing but a lawsuit.” (*Id.*). The June 6
3 Letter went on to proclaim that “he would not surrender the Papago land to
4 any would be purchaser ‘to anyone come typhoon, tsaunami, volcanic
5 eruption or the devil himself.’” (*Id.*). Pangelinan further stated that “anyone
6 coming to the land claiming it would feel his ‘wrath with a vengeance.”
7 (Compl. ¶ 6.); *see also* R. Alexander Decl. Regarding Report on Notice of
8 Sale (June 13, 2006) (No. 508).

10 13. As a result of the Letter, the auction was cancelled and
11 rescheduled for a later date. *See* Report on Notice of Sale for June 2, 2006
12 (June 13, 2006) (No. 507).

13 14. The Trinidad Plaintiffs received a second letter intended for an
14 editor to a Saipan newspaper on June 19, 2006. In addition to reiterating that
15 he would not yield his property to any purchaser and that he “would breathe
16 his wrath down on the purchaser with a vengeance,” Pangelinan also stated
17 that “[t]he whole world is informed here that I am ready to brawl with any
18 trespasser or usurper who would come in on [this] land.” This letter was also
19 published in the MARIANAS VARIETY. *See* Order Holding John S. Pangelinan
20 in Civil Contempt of Court (Oct. 23, 2006) (No. 582).

22 15. As a result of the publication of the Letter, a grand jury
23

1 subsequently indicted Pangelinan on two counts of obstruction of a court
2 order in violation of 18 U.S.C. § 1509, arising out of his use of threats to
3 interfere with a court order. (*See* Compl. ¶ 10 mentioning only the one
4 count); *see also United States v. Pangelinan*, 2007 WL 2962354 (9th Cir.
5 2007) (reversing jury conviction on Count 1, but affirming conviction on
6 Count 2).

7
8 16. The Ninth Circuit ruled that Pangelinan's June 19, 2006, letter
9 contained language which a rational trier of fact could find expressed a threat
10 of physical harm to person or property. *Id.*

11 17. At Tenorio's request, on June 29, 2006, the court issued a
12 temporary restraining order to prevent Pangelinan from again interfering with
13 the rescheduled judicial sale. *See* Order Granting Motion for Temporary
14 Restraining Order (June 30, 2006) (No. 538). In material part, the order
15 required Pangelinan to "refrain immediately from impeding or interfering with
16 the levy on and judicial sale of Lot No E.A. 222, the acquisition of the
17 property, subsequent occupancy, transfer, quiet enjoyment, or other use."^{19/}
18 At the hearing, Pangelinan testified that he would not surrender the premises
19 and also mentioned that "the sale would be void as the underlying civil
20 judgment was void for lack of jurisdiction." (Compl. ¶ 13.)
21

22
23 ¹⁹ Pangelinan characterizes the temporary restraining order as a "non-existent,
post-judgment already-enforced-judgment writ." (*See* Compl. ¶ 46.)

1 18. The court converted the temporary restraining order into a
2 permanent injunction on August 2, 2006.^{20/}

3 19. Pursuant to court order, Mr. Alexander issued a revised Notice of
4 Sale and appeared at the office of Alexander Realty in San Jose, Saipan on
5 July 28, 2006, to offer the Papago Property to the highest bidder.^{21/}

6 20. Pursuant to the second notice of sale, on July 28, Alexander
7 offered to sell at public auction all rights, title and interest in Lot EA 222.
8 Two bids were made for the property. As the highest bidder, Defendant Rufo
9 Mafnas's bid was accepted.

10 21. On August 14, 2006, the court stayed the sale when information
11 came to light indicating that Pangelinan had, at the last minute, recorded
12 deeds for the property naming his sons as the transferees. *See* Order holding
13 Pangelinan in Civil Contempt for failing to appear; for recording a
14 Pangelinan in Civil Contempt for failing to appear; for recording a
15 confirmation deed and quitclaim deed in violation of the restraining order.^{22/}

16 22. By separate order, the court declared the deeds from Pangelinan
17
18
19

20 ²⁰Order Granting Motion for Permanent Injunction (Aug. 2, 2006) (No. 553.)

21 ²¹Exhibit to Motion to Lift Stay and to Confirm Sale of Lot No. E.A. 222 (Nov.
22 13, 2006) (No. 587).

23 ²²Order Holding John S. Pangelinan in Civil Contempt of Court (Oct. 23, 2006)
(No. 582).

1 to his sons null and void.^{23/}

2 23. The court confirmed the sale of Lot E.A. 222 on December 16,
3 2006, and ordered the Pangelinans to leave the premises and property
4 peacefully without provoking a breach of the peace or interfering with the use
5 and quiet enjoyment of the property.

6 24. After securing the property, federal marshals tendered the
7 property to Roy Alexander who, in turn, surrendered the premises to Rufo
8 Mafnas.^{24/}
9

10 **LEGAL STANDARD GOVERNING THIS MOTION**

11 Under Federal Rule of Civil Procedure 12(b)(6), a district court must
12 dismiss a complaint if it fails to state a claim upon which relief can be
13 granted. *Bell Atlantic Corp. v. Twombly*, --- U.S. ----, ----, 127 S. Ct. 1955,
14 1959, 167 L.Ed.2d 929 (2007). The question presented by a motion to dismiss
15 is not whether the plaintiff will prevail in the action, but whether the plaintiff
16 is entitled to offer evidence in support of the claim. *See Scheuer v. Rhodes*,
17 416 U.S. 232, 236, 94 S. Ct. 1683, 1686, 40 L.Ed.2d. 90 (1974), *overruled on*
18 *other grounds by Davis v. Scherer*, 468 U.S. 183, 104 S. Ct. 3012 (1984). In
19

21 ²³Order Declaring that Document Nos. 06-182 and 06-1833, in the
22 Commonwealth Recorder's Office, are Null and Void (Nov. 7, 2006) (No. 586).

23 ²⁴Order Granting Motion to Confirm Sale (Dec. 18, 2006) (No. 602).

1 making its determination, the Court need not credit “bald assertions,
 2 unsupportable conclusions, periphrastic circumlocutions, and the like” when
 3 evaluating the Complaint's allegations. *Aulson v. Blanchard*, 83 F.3d 1, 3 (1st
 4 Cir. 1996).

5 Where there is a conspiracy claim for violation of constitutional rights,
 6 the Ninth Circuit requires a plaintiff to state specific facts to support the
 7 existence of the claimed conspiracy. *See Olsen v. Idaho State Bd. of*
 8 *Medicine*, 363 F.3d 916, 929-30 (9th Cir. 2004). Accordingly, a Bivens
 9 conspiracy claim must not only plead facts establishing the defendants as state
 10 or federal actors: it must also plead with certain specificity. *Id.* Where a
 11 complaint lacks any facts specific to a conspiracy and particularly an
 12 agreement to violate a plaintiff's civil rights, the claim will be dismissed for
 13 failure to state a claim.^{25/} *Id.*

15 ²⁵Prior to *Galbraith v. County of Santa Clara*, 307 F.3d 1119, 1126 (9th Cir.
 16 2002), the Ninth Circuit imposed a heightened pleading standard requiring evidence of an
 17 agreement to violate specific constitutional rights. *Branch v. Tunnell*, 937 F.2d 1382,
 18 1386 (9th Cir. 1991) (en banc). In *Galbraith*, a three-judge panel of the Ninth Circuit
 19 examined Supreme Court precedent disapproving of heightened pleading standards in
 20 civil rights cases brought under Title VII and found this precedent contrary to the
 21 decision in *Branch*. On this basis, it determined that *Branch* was no longer good law.
 22 *Galbraith* then went on to eliminate the heightened pleading requirement for improper
 23 motive in constitutional tort cases. 307 F.3d at 1125-26.

Despite the holding in *Galbraith*, the Ninth Circuit appears to still apply a
 heightened pleading standard to conspiracy claims. *See Olsen*, 363 F.3d at 929.
 Notwithstanding *Galbraith*, *Olsen* relied apparently upon *Branch* to support the
 application of the heightened standard, the very same case that the Ninth Circuit
 acknowledged had been overruled in *Galbraith*. Given *Galbraith's* holding, there is
 reason to question whether a heightened pleading standard applies. At the very least,
Galbraith suggests the standard should be applied liberally to give defendants enough
 information about the alleged conspiracy to permit them to frame a response.

1 Finally, even though pro se pleadings are held to a less stringent
2 standard than those drafted by lawyers, courts in this Circuit have ruled that
3 even pro se litigants are bound by the Federal Rules of Civil Procedure. *See,*
4 *e.g., King v. Atiyeh*, 814 F.2d 565 (9th Cir 1987); *Warren v. Guelker*, 29 F.3d
5 1386, 1390 (9th Cir. 1994) (“We recognize that pro se complaints are read
6 liberally, but they still may be frivolous if filed in the face of previous
7 dismissals involving the exact same parties under the same legal theories.”).
8 Even though the Federal Court is charged with liberally construing a
9 complaint filed by a pro se litigant to allow the development of a potentially
10 meritorious case, moreover, the requirement of liberal construction does not
11 mean that the Court can ignore a clear failure in the pleadings to allege facts
12 which set forth a Federal claim. *See Ajaj v. United States*, 479 F.Supp.2d 501,
13 535-36 (D. S.C. 2007).

14 ARGUMENT

16 A. THE CONSTITUTIONAL CLAIMS AGAINST TENORIO AND 17 TORRES FAIL BECAUSE THEY ARE NOT GOVERNMENT 18 ACTORS

19 The Supreme Court has conclusively ruled that there is no private right
20 of action under Bivens for damages against private entities acting under color
21 of federal law. *See Correctional Servs. Corp. v. Malesko*, 534 U.S. 61, 66,
22 122 S. Ct. 515, 519, 151 L.Ed.2d 456 (2001) (in action alleging constitutional
23

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1 deprivation against private operator of halfway house, Supreme Court rejected
2 the request to extend Bivens liability to new category of defendants); *Meuse v.*
3 *Pane*, 322 F.Supp.2d 36, 38-39 (D. Mass.2004) (holding that plaintiff could
4 not sustain a Bivens action against broadcast network because “a Bivens
5 claim is simply not available against a private entity even if that entity is
6 acting under the color of federal law”). Accordingly, for a Bivens claim to
7 succeed, a plaintiff must allege: (1) that the defendant was acting under color
8 of federal law; and (2) the defendant violated the plaintiff's constitutional
9 rights. *See Hartman v. Moore*, 547 U.S. 250, 256, 126 S. Ct. 1695, 1701, 164
10 L.Ed.2d 441 (2006); *Morgan v. United States*, 323 F.3d 776, 780 (9th Cir.
11 2003). Once a Plaintiff establishes that a defendant has acted under federal
12 law, “[t]here are two aspects to the second inquiry: 1) there must have been a
13 deprivation of federally protected rights, privileges or immunities, and 2) the
14 conduct complained of must have been causally connected to the
15 deprivation.” *Gutierrez-Rodriguez v. Cartagena*, 882 F.2d 553, 559 (1st Cir.
16 1989).

17
18 In this case, the court need not even reach the second criterion because
19 Pangelinan fails to allege any facts establishing the first one: the Complaint
20 against Tenorio and Torres fails to allege any factors that could conceivably
21 qualify them as an arm of the government.

22 It is true, as Plaintiff asserts, that victims of constitutional violations by
23

1 *federal employees or agents* may maintain so-called Bivens claims for
2 damages, despite the absence of any statute specifically conferring such a
3 right. *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403
4 U.S. 388, 391, 91 S.Ct. 1999, 2002, 29 L.Ed.2d 619 (1971) (emphasis added).
5 It is equally true that the private status of a defendant does not automatically
6 defeat a Bivens claim, *provided that the defendant engaged in federal action*.
7 (emphasis added.) Although United States Supreme Court jurisprudence
8 outlines several approaches or discrete tests for detecting the presence of
9 action under color of state law, none of these tests apply here, since
10 Pangelinan has alleged no facts giving rise to any of them. *See Groman v.*
11 *Township of Manalapan*, 47 F.3d 628, 639 (3d Cir. 1995) (listing the tests as
12 the exclusive government function approach, the joint participation or
13 symbiotic relationship approach, and the nexus approach).

14
15 The Complaint does not contain any allegations that either Torres or
16 Tenorio were engaged in federal law enforcement activity, were on the
17 government payroll, received federal funding for their work, or were even
18 authorized to perform a government task as government agents or actors. Nor
19 does the Complaint provide a clue as to how Tenorio or Torres acted in
20 concert with any federal defendant so as to qualify as federal actors on these
21 grounds. Because the thrust of Plaintiff's grievances against Torres and
22 Tenorio concern, only, actions taken on behalf of their clients during the
23

1 course of a legal proceeding as private counsel, there is no evidence
2 establishing them as government actors who can be liable for federal
3 constitutional violations under Bivens. *See Mathis v. Pac. Gas & Elec. Co.*,
4 75 F.3d 498, 503 (9th Cir.1996) (finding that it was error not to dismiss a
5 Bivens claim absent proof that the defendant was an agent of the federal
6 government); *Lacedra v. Donald W. Wyatt Detention Facility*, 334 F.Supp.2d
7 114, 136-37 (D. R.I. 2004) (dismissal is warranted when plaintiffs did not
8 allege that the defendants were federal agents); *Stone v. Baum*, 409 F.Supp.2d
9 1164, 1176 (D. Ariz. 2005) (plaintiffs may not sue a lawyer in private practice
10 for violations of their civil rights because private practice attorneys are not
11 state actors).

12 Dismissal is therefore warranted as to all claims.

13
14 **B. PLAINTIFF FAILS TO PLEAD A CONSPIRACY CLAIM AND**
15 **THAT HE WAS ENGAGED IN PROTECTED CONDUCT**

16 Pangelinan contends that Torres and Tenorio “are private attorneys who
17 were state actors and who at all relevant times substantially employed and
18 utilized the aid of, and at times aided, in collusion, combination and
19 collaboration with the Federal Defendants, one way or another. . . .” Under
20 any standard of pleading, let alone the pleading standard required in the Ninth
21 Circuit in *Olsen*, this conspiracy claim fails.

22 First, Plaintiff does not explain anywhere in his complaint how Tenorio
23

1 or Torres were involved in the alleged federal court conspiracy. The only
2 stated explanation of these attorneys' "wrongful conduct" was their use of
3 judicial process to enforce a valid judgment of this court. Second, *Olsen*
4 requires Pangelinan to state specific facts to support the existence of his
5 conspiracy claim which must include discussion of an agreement among the
6 alleged conspirators to violate his civil rights.^{26/} Because Pangelinan chooses
7 to overlook this requirement, the Complaint fails on these grounds.

8
9 Finally, to establish a First Amendment retaliation claim in an
10 "ordinary citizen" case – that is, a case that does not involve an employment
11 or contractual relationship between the plaintiff and the government--a
12 plaintiff must show (1) that he engaged in constitutionally protected activity,
13 (2) that the defendant's actions caused "an injury that would chill a person of
14 ordinary firmness from continuing to engage in that activity," and (3) that the
15 actions complained of were "substantially motivated" by the plaintiff's
16 protected activity. *Skoog v. County of Clackamas*, 469 F.3d 1221, 1231-32
17 (9th Cir. 2006); *Keenan v. Tejeda*, 290 F.3d 252, 258 (5th Cir. 2002).

18 Pangelinan utterly fails in this regard, since there is no constitutional right to
19 threaten people with harm. There is no constitutional right to avoid paying a
20

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22 ²⁶*Cf. Harris v. Broderick*, 126 F.3d 1189, 1196 (9th Cir. 1989)(stating that at a
23 bare minimum a plaintiff must "plead with particularity as to which defendants conspired,
how they conspired and how the conspiracy led to a deprivation of his constitutional
rights").

1 judgment. There is no constitutional right to ignore court orders. Moreover,
2 because there *was* probable cause for indicting Pangelinan on obstruction of a
3 court order for publishing his threatening and intimidating Letter, no claim for
4 retaliatory prosecution can exist. *See Moore*, 547 U.S. at 260-61, 126 S. Ct.
5 1704. (emphasis added.)

6 **C. TORRES AND TENORIO ARE ENTITLED TO SANCTIONS**

7 In *Pangelinan*, 54 F.Appx 472, 2003 WL 124474, the Ninth Circuit
8 warned Pangelinan that because a private attorney representing the Trinidad
9 Plaintiffs in Civil Action 97-0073 was not a state actor, the attorney could not
10 be sued for constitutional violations. In bringing this lawsuit against Torres
11 and Tenorio, Pangelinan once again filed a lawsuit founded on arguments that
12 have been previously litigated and rejected.

13 As a result of his choice to continue with his meritless challenges to the
14 Underlying Judgment, Torres and Tenorio have been forced to incur expenses
15 and other costs to respond. Under these circumstances and even against pro
16 se litigants, the Ninth Circuit has consistently ruled that an award of damages
17 is appropriate as a sanction for filing a frivolous action. *See* 120 Fed.Appx.
18 742, 2005 WL 332757 (9th Cir. Feb. 11, 2005). Rule 11 sanctions as well as
19 sanctions under 28 U.S.C. § 1927 and 42 U.S.C. 1988, are therefore warranted
20 against Pangelinan in this case. *See Stone*, 409 F.Supp.2d at 1171.

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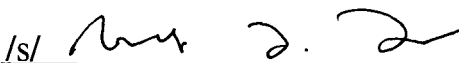
CONCLUSION

While a complaint subject to a 12(b)(6) motion is to be construed liberally in a plaintiff's favor, *Twombly* makes clear that it need not accept inferences drawn by plaintiffs if those inferences have no support in the facts alleged in the complaint. Although a complaint "does not need detailed factual allegations," it plainly "requires more than labels and conclusions, and a formalistic recitation of the elements of a cause of action will not do." *Twombly*, 127 S. Ct. at 1964-65. In fact, the "[f]actual allegations must be enough to raise a right to relief above the speculative level." *Id.* at 1965; *see also Iqbal v. Hasty*, 490 F.3d 143, 157-58 (2d Cir.2007) (plaintiff must "amplify a claim with some factual allegations in those contexts where such amplification is needed to render the claim plausible"). Where, as here, there are no facts establishing Tenorio or Torres as federal actors, the court cannot credit a plaintiff's "bald assertions" or "legal conclusions" to the contrary. *Twombly*, 127 S. Ct. at 1964-65. Dismissal is, accordingly, warranted when a plaintiff has not pled "enough facts to state a claim to relief that is plausible on its face." *Id.* at 1974.

Without a shred of evidence establishing Tenorio and Torres as state actors, John Pangelinan has filed a complaint against them for vague and amorphous constitutional violations in utter disregard of applicable law. For

1 the foregoing reasons, therefore, all claims against Lillian A. Tenorio and
2 Robert T. Torres should be dismissed with prejudice. To put an end to
3 Pangelinan's harassment and to compensate these attorneys for the bad faith
4 filing of what can only be characterized as a frivolous and groundless lawsuit,
5 the Court should impose sanctions in the form of costs and fees.

6 Respectfully submitted this 14th day of February, 2008.
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